



**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**

**24 CFR Part 15**

**[Docket No. FR-5624-P-01]**

**RIN 2501-AD57**

**Revision of Freedom of Information Act Regulation**

**AGENCY:** Office of the Secretary, HUD.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would amend HUD's regulations implementing the Freedom of Information Act (FOIA). HUD is proposing these amendments to update and streamline HUD's current FOIA regulation. This proposed rule would update HUD's regulations to reflect statutory changes to FOIA, current HUD organizational structure, and current HUD policies and practices with respect to FOIA. Finally, the rule would use current cost figures in calculating and charging fees.

**DATES:** Comment Due Date: **[Insert date 60 days after date of publication in the FEDERAL REGISTER].**

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposed rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW, Room 10276, Washington, DC 20410-0500. All submissions must refer to the above docket number and title. There are two methods for submitting public comments.

1. Submission of Comments by Mail. Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban

Development, 451 7th Street, SW, Room 10276, Washington, DC 20410-0001.

2. Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov). HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the [www.regulations.gov](http://www.regulations.gov) website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

No Facsimile Comments. Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202-708-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the toll-free Federal Relay Service at 1-800-877-8339. Copies of all comments submitted are available for inspection and downloading at [www.regulations.gov](http://www.regulations.gov).

**FOR FURTHER INFORMATION CONTACT:** Dolores W. Cole, Director, FOIA and Executive Correspondence, Executive Secretariat Division, Office of the Chief Human Capital

Officer, Department of Housing and Urban Development, 451 7th Street, SW, Room 10139, Washington, DC 20410-0500, telephone number 202-402-2671 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Relay Service at telephone number 1-800-877-8339.

## **SUPPLEMENTARY INFORMATION**

### **I. Background**

HUD's regulations at 24 CFR part 15 contain the policies and procedures governing public access to HUD records under FOIA (5 U.S.C. 552). Subject to certain statutory exceptions, FOIA gives persons the right to request and receive a wide range of information from any federal agency. FOIA has been amended several times since its enactment in 1966. In 2007, significant amendments to FOIA were made by the Openness Promotes Effectiveness in Our National Government Act of 2007 (OPEN Government Act) (Pub. L. 110-175, approved December 31, 2007). The OPEN Government Act made several amendments to procedural issues affecting FOIA administration, including the protection of fee status for news media, time limits for agencies to act upon FOIA requests, the availability of agency records maintained by a private entity, the establishment of a FOIA Public Liaison and FOIA Requester Service Center, and the requirement to describe the exemptions authorizing the redaction of material provided under FOIA.

In addition to these statutory changes, several policy directives have recently been issued that affect HUD's FOIA program. These policy directives include Presidential Memoranda dated January 21, 2009, entitled "Freedom of Information Act" (74 FR 4683, January 26, 2009) and "Transparency and Openness" (74 FR 4685, January 26, 2009), which encourage federal agencies to apply a presumption of disclosure in FOIA decision making. As

required by the Presidential Memoranda, on March 19, 2009, Attorney General Eric Holder issued comprehensive new FOIA guidelines (see <http://www.justice.gov/ag/foia-memo-march2009.pdf>). The Attorney General's guidance further advises that agencies should release information to the fullest extent of the law, including information that may be legally withheld, provided there is no foreseeable harm to an interest protected by an exemption or the disclosure is not prohibited by law. In addition, the Attorney General's FOIA guidelines emphasized that agencies must have effective systems in place for responding to FOIA requests.

Consistent with this law and guidance, HUD undertook a comprehensive review of its FOIA regulation. As part of this review, HUD looked to the proposed FOIA regulation published by the Department of Justice (DOJ) on March 21, 2011 (76 FR 15236). DOJ intended for these revised regulations to serve as a model for all agencies to similarly use in updating their own FOIA regulations (see <http://www.judiciary.senate.gov/pdf/11-3-15%20Pustay%20Testimony.pdf>). As a result of this review, HUD proposes to revise its FOIA regulation, modeled on DOJ's proposed regulation, to incorporate changes enacted by the OPEN Government Act of 2007, reflect developments in the case law, and include current cost figures for calculating and charging fees. Additionally, this proposed rule would reorganize HUD's current FOIA regulation and eliminate outdated regulatory provisions. Further, the proposed rule would incorporate changes to the language and structure of the regulation. Titled section headings would eliminate the question-and-answer format, as well as the form of address "you." These proposed changes are intended to enhance the administration and operation of HUD's FOIA program by increasing the transparency and clarity of the regulation.

## **II. Amendments Proposed by this Rule**

The following is a section-by-section overview of the amendments proposed by this rule.

### **§ 15.1 General Provisions**

This section would be revised to clarify that the Federal Housing Administration (FHA) and the Government National Mortgage Association (Ginnie Mae) are components of HUD and covered by part 15. This section would also be revised to emphasize that consistent with the January 21, 2009, Presidential Memoranda, HUD may make information routinely provided to the public as part of a regular Department activity available without following this subpart.

### **§ 15.2 Definitions**

This section would be revised by adding a definition for “agency records” to mean any documentary material that is either created or obtained by HUD in the transaction of agency business and which is under agency control at the time of the FOIA request, but not records that are not already in existence. HUD is proposing this definition to provide clarity to its FOIA regulation. This section would also update and clarify terms already in the current regulation. Definitions pertaining to fees would be relocated to proposed § 15.106.

HUD is also proposing to restructure this section to clarify that the terms “Appropriate Associate General Counsel,” “Appropriate Regional Counsel,” and “Authorized Approving Official” apply only to subparts C and D of part 15, which address the production or disclosure of any material or the provision of testimony in legal proceedings. HUD is proposing these changes to provide the public with a clearer understanding of the administration and operations of the Department’s FOIA program.

### **§ 15.101 Proactive Disclosures of Department Records**

The President’s January 21, 2009, memorandum entitled “Freedom of Information Act” directs federal agencies to take affirmative steps to make information public, that they should not wait for specific requests from the public, and that they should use modern technology to inform

the public. Consistent with this direction, § 15.101 describes the ways in which HUD makes information regarding HUD and its programs more readily available to the public. This section would emphasize HUD's preference for online requests and information access. Specifically, § 15.101 lists certain fundamental information that HUD makes available without request, including final opinions and orders, regulatory authority and statements of policy and interpretation for each HUD program office. Recognizing that the public is interested in information regarding the activities of HUD, § 15.101 would also inform the public that HUD makes frequently requested information available through its electronic FOIA Reading Room. The information includes, but is not limited to, HUD's highest-scoring funding grant applications, HUD handbooks, the list of FHA approved lenders, and a list of homes for sale, as well as information regarding applying for public and Section 8 housing, public housing contact information, and HUD's FOIA logs.

#### **§ 15.102 – Requirements for Making Requests for Records**

Currently codified § 15.103, which provides guidance regarding obtaining HUD records, would be revised and redesignated as § 15.102. The proposed revisions would provide more detail on the itemized requirements for submitting a FOIA request. One revision in § 15.102 would require requesters to agree to pay for costs that exceed \$25 for records search, review, and duplication. HUD is proposing this provision to allow the agency to avoid spending time and resources processing FOIA requests that will not be completed due to the requester's refusal to pay the assessed fees. The revision would also add language that encourages requesters seeking a fee waiver or fee reduction to include such request with their request for information and to describe how the disclosure of the requested information is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the

commercial interest of the requester. Finally, the revision would clarify that requests for HUD records, whether located in HUD Headquarters or HUD field offices, may be submitted by mail, email, facsimile, or the electronic request form located on HUD's FOIA website at <http://www.hud.gov>. HUD is proposing these changes to improve efficiency.

### **§ 15.103 – Timing of Responses to Requests**

Currently codified § 15.104, which outlines the time periods for HUD to respond to FOIA requests, would be revised and redesignated as § 15.103. Paragraphs (a) and (b) of § 15.103 would incorporate changes enacted by section 6 of the OPEN Government Act, which amends the time limits for complying with FOIA requests and establishes when an agency may toll the statutory time period. First, § 15.103(a) incorporates the provision which provides that the 20-day period for responding to a FOIA request for information begins on the date on which the request is first received by the appropriate agency component designated to receive the request, but not in any event later than 10 days after the request is received by any agency component designated to receive FOIA requests. Second, consistent with the OPEN Government Act, § 15.103(b) would provide that HUD may make one request to the requester for additional information and toll the statutory time period while waiting for receipt of the additional information requested from the requester. This paragraph would also permit HUD to toll the time period to clarify with the requester issues regarding fee assessments. There is no limit given for the number of times that HUD may go back to a requester to clarify issues regarding fee assessments, which may need to be done in stages as the records are being located and processed. In both situations, HUD's receipt of the requester's response to its request for additional information or the resolution of the fee issue would end the tolling period.

Section 15.103(c), which addresses when HUD may extend the time periods for

processing a FOIA request, restates and clarifies current § 15.104(c). While § 15.103(c) continues to provide that HUD may extend the time period for processing a request in unusual circumstances, HUD is revising the provision for clarity, emphasizing examples of what may constitute unusual circumstances.

Finally, consistent with 5 U.S.C. 552(a)(6)(B)(iv), § 15.103(d) would provide that HUD may aggregate certain requests submitted by the same requester or by a group of requesters acting in concert. Accordingly, HUD proposes to aggregate multiple requests when HUD determines that certain requests are from the same requester or from a group of requesters acting in concert and the requests involve clearly related matters. This change would allow HUD to more effectively respond to multiple requests for information that are clearly related.

#### **§ 15.104 – Procedures for Processing FOIA Requests**

Currently codified § 15.105, which discusses how HUD will respond to FOIA requests, would be revised, and redesignated as § 15.104, for clarity and to increase transparency in HUD's processing of FOIA requests. Section 15.104(a) would provide that unless a request is deemed "expedited" as set forth in proposed § 15.104(c), HUD generally responds to FOIA requests in order of receipt. Responding to requests in the order of receipt is not new, being that it currently is codified in § 15.105(a). HUD proposes revising this section, however, for clarity and to increase transparency in HUD's processing of FOIA requests.

Section 15.104(b) is new and implements section 7(a) of the OPEN Government Act, which requires agencies to assign a tracking number for each request and provide requesters with information regarding the status of their request.

Section 15.104(c) would clarify HUD's use of expedited processing, consistent with 5 U.S.C 552(a)(6)(E), which requires agencies to promulgate regulations that provide for the



expedited processing of requests if the requester demonstrates a compelling need, or in other cases as determined by the agency. Section 15.104(c) would restructure for clarity currently codified § 15.105(b), which specifies the circumstances that constitute a compelling need. Specifically, § 15.104(c) would provide that HUD may expedite processing of a request if it determines that the request is: (1) one that involves circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual, (2) a circumstance in which an urgent need of a person primarily engaged in disseminating information exists to inform the public about an actual or alleged federal government activity, or (3) one where there exists risk of loss of substantial due process rights. Section 15.104(c)(3) would provide that requests for expedited processing contain a detailed explanation of the basis for such request, which is certified as true and correct to the best of the requester's knowledge and belief. HUD is proposing these changes to allow it to more effectively respond to requests for expedited processing.

Finally, §15.104(d) would restate and revise current § 15.105(a) to provide that HUD may use two or more processing tracks by distinguishing between simple and more complex requests based on the amount of time and work needed to process the request. Section 15.104(d)(2) would clarify that HUD may provide requesters on a slower track an opportunity to limit the scope of their request in order to qualify for faster processing consistent with § 15.104(c).

### **§ 15.105 – Responses to Requests**

Currently codified § 15.106 would be revised and redesignated as § 15.105. HUD is proposing revisions to describe in greater detail the process by which HUD responds to FOIA

requests. Section 15.105(a) would update HUD's FOIA regulation to reflect current HUD organizational structure. Section 15.105(a) would also provide that an acknowledgement letter be sent to each requester, confirming receipt of the request by the appropriate HUD office and providing an assigned tracking number, as proposed by § 15.104(b). Consistent with current § 15.104(c), § 15.105(b) would provide that, if the FOIA request seeks agency records in HUD's possession that originated with or are of primary interest to another agency, HUD may either respond to the request after consultation or coordination with the other agency or refer the request to the other agency for processing. Finally, § 15.105(d) would substantially expand current § 15.106(b) by identifying who is authorized to deny a FOIA request on behalf of HUD, describing the process by which the requester is given notification of the denial, and providing examples of determinations that constitute a denial of a FOIA request. Section 15.105(d) would also provide that denials of FOIA requests, in whole or in part, not only must be made in writing and include the name and title or position of the denying employee or officer, a statement of the reasons for the denial, and a statement of appeal rights, but must also include an estimate of the volume of records denied, when appropriate, and an indication of the exemption under which any deletions have been made, unless doing so would harm an interest protected by the exemption. HUD is making these changes to implement section 12 of the OPEN Government Act and to eliminate the confusion experienced by requesters whose FOIA requests are denied in whole or in part. Section 12 requires agencies to indicate the exemption under which a deletion is made directly on the released portion of the record unless doing so would harm an interest protected by the exemption.

#### **§ 15.106 – Fees**

Section 15.106 would provide the general basis by which HUD will assess fees, and would partially incorporate provisions of current § 15.110. Significantly, § 15.106(a) would provide that HUD will collect applicable fees prior to sending copies of requested information to the requester. Section 15.106(a) also would provide that payment be in the form of a check or money order made payable to the United States Treasury.

Section 15.106(b) is new and would define various terms and activities applicable to HUD's processing of FOIA requests. HUD's definition of "commercial use" would parallel the description of "commercial user requester" in current § 15.110(b)(1). Should HUD determine that the requested information is to be used for commercial purposes, HUD would provide the requester with a reasonable opportunity to clarify the use to which the requester seeks to put the information. "Direct costs" would be defined to mean those expenses that HUD actually incurs in searching for and duplicating and, in the case of commercial use requests, reviewing records to respond to a FOIA request. HUD would explicitly include as direct costs the salary of the employee performing the work and the cost of operating computers and other electronic equipment. The definition of "duplication" would be moved to § 15.106(b) and would indicate that HUD will honor the requester's specified preference of form or format of disclosure if the record is readily reproducible, with reasonable efforts, in the requested form or format.

Similarly, the definition of "educational institution" would be moved to § 15.106(b) and revised by adding that, to be in this category, a requester must show that the request is authorized by, and is made under the auspices of, a qualifying institution and that the records are not sought for a commercial use but are sought to further scholarly research. Records requested for the intention of fulfilling credit requirements are not considered to be sought for a scholarly purpose.

"Noncommercial scientific institution" would be defined parallel to the description of

“noncommercial scientific institution requester” in current § 15.110(b)(3), and be revised by adding that, to be in this category, a requester should show that the request is authorized by, and is made under the auspices of, a qualifying institution and that the records are not sought for a commercial use but are sought to further scientific research. Finally, “representative of the news media” would be defined in a manner that tracks the definition provided in section 3 of the OPEN Government Act.

Section 15.106(c) would establish the manner in which HUD would charge fees for its records search, review, duplication, and certification, and would charge for other services provided in response to a FOIA request. These changes are consistent with DOJ guidance and the practice of other federal agencies. For document search and review, HUD proposes to charge \$13 per quarter hour for professional staff and \$6 per quarter hour for staff personnel involved in the search for and review of documents, and to roundup to the next quarter hour for professional and clerical search and review services that exceed a quarter-hour. Once the records search and review are complete, HUD would assess duplication costs at \$0.18 per page for each paper record copied. This amount would not be increased from that provided for under current § 15.110(c). Duplication costs for media copies would be the actual cost of the media. Section 15.106(b) would define “direct costs” to include expenses that HUD actually incurs in searching for records responsive to a FOIA request and would include the cost of operating computers and electronic equipment. Consequently, HUD proposes to charge the direct costs of any programming services required to conduct a search, including the cost associated with the creation of a new program to locate the requested records. Under proposed § 15.106(c), application of these fees to the category of requester would not change from that currently provided under § 15.110(c).

Section 15.106(d) would provide restrictions on HUD's charging of fees, and is similar to § 15.110 in that it provides that no search or review fee will be charged for requests submitted by educational institutions, noncommercial scientific institutions, or representatives of the news media. If HUD fails to comply with the applicable time limits in which to respond to a request, and no unusual or exceptional circumstance exists, this section would provide that HUD may not charge search fees or, in the instances of requests from educational institutions, noncommercial scientific institutions, and representatives of the media, duplication fees. Identical to current § 15.110(g), proposed § 15.106(d) would provide that HUD will not charge a fee if the total cost to respond to the request does not exceed \$25.

Section 15.106(e) would provide that HUD will notify the requester when it estimates or determines that the fees for a FOIA request will exceed \$25. Under this proposal, HUD will not perform further work on the request until the FOIA requester either makes a written, firm commitment to pay the anticipated additional costs or pays these additional costs. The failure of the requester to provide a firm commitment to pay the anticipated fee, within the time period specified by HUD, will result in the request being closed. HUD is proposing this provision to avoid spending time and resources processing FOIA requests that will not be completed due to the requester's refusal to pay the assessed fees.

Section 15.106(f) would reserve to HUD the right to provide special services, such as certifying the records, to a requester at the direct cost of such services. Proposed § 15.106(g) would incorporate the substance of current § 15.110(j), but would provide that interest is charged on unpaid fees, pursuant to the Debt Collection Act of 1982, as amended (5 U.S.C. 5514; 31 U.S.C. 3701 et seq.), beginning on the 31st day after the billing date. Section 15.106(h) would incorporate, without substantial alteration, current § 15.110(e) by stating that HUD may

aggregate FOIA requests for purposes of assessing fees when the FOIA requests are related in purpose and HUD reasonably believes that the FOIA requests were submitted separately to avoid or reduce applicable fees. HUD proposes, however, to add that aggregation of requests for fee purposes will be conducted independent of aggregation of requests for purposes of establishing the time to respond under § 15.103(d).

Section 15.106(i) would describe when and how HUD may request advance payment before processing a FOIA request. Specifically, HUD would require advance payment when it determines that a total fee to be charged exceeds \$250. Consistent with current § 15.110(i), it would also provide that when a requester has previously failed to pay a properly charged FOIA fee to HUD within 30 days of the date of billing, HUD may require the requester to pay the full amount due, plus any applicable interest, and to make an advance payment of the full amount of any anticipated fee before HUD begins to process a new request or continues to process a pending request from that requester. Section 15.106(j) is new and would add a provision that advises requesters that the fee schedule does not apply to records for which a fee is specifically established by statute. HUD proposes notifying requesters when records responsive to their requests are subject to a statutorily based fee schedule.

Finally, § 15.106(k) would update current § 15.110(h) by providing additional detail as to what factors HUD considers to determine whether a waiver or reduction of fees is warranted. Section 15.106(k)(1) establishes two requirements that must be met for HUD to consider a reduction or waiver of fees, specifically: (1) the disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and (2) the disclosure of the information is not primarily in the commercial interest of the requester. Paragraphs (k)(2) and (k)(3) of § 15.106 would list the

factors that HUD will consider to determine whether the disclosure is in the public interest and is primarily in the commercial interest of the requester. Section 15.106(k)(4) would clarify that if a fee waiver requirement is met for only a portion of a FOIA request, HUD may waive or reduce fees only for that portion of the request. Section 15.106(k)(5) would require a requester seeking a fee waiver or reduction to submit evidence demonstrating that the FOIA request meets the criteria set forth in this section. HUD, in deciding to grant waivers or reductions of fees, may also consider the cost effectiveness of its investment of administrative resources. These amendments would update the waiver processes to be consistent with the current law and government practice, as well as the Office of Management and Budget (OMB) Fee Guidelines, and to clarify them for the public.

#### **§ 15.107 – Documents Generally Protected from Disclosure**

Section 15.107 incorporates and revises current § 15.3 by describing the nine FOIA exemptions that protect various records from disclosure (5 U.S.C. 552(b)). For clarity and enhanced transparency, this section would describe how HUD generally applies each exemption. Specifically, HUD seldom relies on Exemption 1 (classified documents). Exemption 2 (internal agency rules and practices) protects records relating to internal personnel rules and practices. With regard to Exemption 3 (information prohibited from disclosure by another statute), this section would cite the statutory provisions that prohibit the disclosure of competitive proposals submitted prior to contract award and covered selection information that might provide a grant applicant an unfair competitive advantage. HUD proposes to address Exemption 4 (commercial or financial information) in § 15.108.

Interagency and intra-agency communications are protected from disclosure under Exemption 5. With regard to Exemption 6 (personal privacy), HUD generally will not disclose

the names, addresses, telephone numbers, and email addresses of persons residing in public or assisted housing or of borrowers in FHA-insured single family mortgage transactions.

Exemption 7 (law enforcement records) protects the disclosure of the names of individuals who have filed fair housing complaints, as well as the names of confidential informants. It also protects techniques and procedures for law enforcement investigations, or guidelines for law enforcement investigations if such disclosure could reasonably be expected to risk circumvention of the law. With regard to Exemption 8 (supervision of financial institutions), HUD proposes to provide that it is considered an “agency responsible for the regulation and supervision of financial institutions” for purposes of monitoring fair housing compliance. Finally, for comprehensiveness, HUD includes a citation to Exemption 9 (wells).

#### **§ 15.108 – Business Information**

Section 15.108 would significantly revise current § 15.108, and describe in detail the procedures HUD will follow when responding to FOIA requests for agency records containing business information. Current § 15.108(a) provides only that HUD may not disclose business information that it considers confidential or which contains financial information, except as provided by the section. Proposed § 15.108(a) restates this provision, but adds a specific reference to Executive Order 12600, “Predisclosure notification procedures for confidential commercial information” (52 FR 23781, June 25, 1987), as the basis for notifying submitters of confidential commercial information when HUD has received a request for such information. The section would emphasize that HUD relies extensively upon information provided by the affected submitter in determining whether the information is confidential and subject to notice provisions. Section 15.108(a) would also explicitly state HUD’s expectation that if sued under



FOIA for nondisclosure of confidential business information, the affected business will cooperate to the fullest extent possible in defending that decision.

Section 15.108(b) would place an affirmative duty on submitters to use good faith efforts to designate, at the time of submission, business information they consider to be protected from disclosure under Exemption 4 (5 U.S.C. 552(b)(4)). This section also protects business information from disclosure for 10 years after the date of the submission, unless the submitter justifies a longer designation period.

As provided by current § 15.108(c), proposed § 15.108(c) provides that HUD will, unless exempted by § 15.108(g), notify the submitter if HUD receives a request for agency records containing information that the submitter has designated as business information.

Section 15.108(d) clarifies when such notice is required and incorporates language currently codified in § 15.108(c). Section 15.108(e) provides that if HUD notifies a submitter that the agency may be required to disclose information the submitter has designated as “business information,” HUD would allow the submitter a reasonable time to object to the proposed disclosure. Consistent with § 15.108(a), submitters who object to the disclosure of information would be requested to demonstrate why the information should be protected as a trade secret or commercial or financial information. Conclusory statements generally would not provide a basis for HUD to protect the information as confidential. HUD proposes to provide that a submitter’s failure to respond to HUD’s notice within the specified time period will be treated as the submitter not objecting to disclosure of the information.

Section 15.108(f) would provide that HUD will consider the objections of the submitter and, unless exempted by § 15.108(g), notify the submitter in writing of HUD’s final decision to disclose the information. Section 15.108(g) would describe the instances when HUD is not

required to give the submitter notice that the agency may be required to disclose information that the submitter has designated as “business information.” These exceptions generally are identical to those currently codified at paragraphs (c)(2), (c)(3), and (c)(4) of § 15.108, and include: (1) where HUD determines that the information should not be disclosed; (2) where the information has been made publicly available; or (3) where the disclosure is required by law (other than FOIA) or regulation. Finally, consistent with § 15.108(a), § 15.108(h) proposes that HUD will notify the submitter should FOIA lawsuits be filed by requesters. Section 15.108(i) would provide for corresponding notice to requesters.

#### **§ 15.109 Mortgage Sales**

Section 15.109 makes minor, nonsignificant changes to current § 15.109. For example, HUD would revise the title of the section to clarify that the provisions set forth in this section apply to mortgage sales (Form HUD-92410, Statement of Profit and Loss). Substantially, proposed § 15.109 is identical to § 15.109 as currently codified. The minor changes would clarify the section and facilitate readability.

#### **§ 15.110 Appeals**

Section 15.110 rennumbers and revises currently codified § 15.111 and describes the appeals process to a FOIA request determination. To streamline HUD’s FOIA process and streamline the appeals procedure for the public, § 15.110 would consolidate the process for all appeals regardless of whether the subject of the appeal is a denial of information, an adverse fee determination, or a denial of a request for expedited processing. In addition, § 15.110 would incorporate those provisions currently codified § 15.112(a), which establishes the length of time by which HUD will respond to requests for appeal.

Section 15.110(a) would provide that appeals should include the assigned tracking number proposed by § 15.104(b). It would also provide that appeals be marked “Freedom of Information Act Appeal” to facilitate HUD’s response. Similar to currently codified § 15.111, it would provide that appeals be postmarked within 30 calendar days of the date of HUD’s determination and that transmittal of an appeal by means other than the United States Postal Service be received by close of business on the 30th day after the date of HUD’s determination.

Section 15.110(b) would maintain the length of time by which HUD will respond to appeals, specifically 10 working days after the date of receipt for appeal of a denial of expedited processing and 20 working days after the date of receipt for all other appeals, unless unusual circumstances require that HUD extends the time for an additional 10 working days.

Section 15.110(c) would provide a consolidated list of information that should be included in an appeal, regardless of type. Generally, appeals should include a copy of the original request, a copy of the adverse determination, a statement of facts and legal arguments supporting the appeal, and any additional information the appellant wishes to include.

Finally, § 15.110(d) is new and provides that requesters should exhaust all administrative remedies before seeking judicial review of HUD’s adverse determinations.

#### **§ 15.111 HUD Response to Appeals**

Section 15.111 provides the process by which HUD will respond to appeals. Significantly, § 15.111(a) provides that the appellate official will conduct a de novo review of the entire record and applicable law when making a decision. This section would provide that HUD’s decision on the appeal would be considered the final action of HUD. Paragraphs (b), (c), and (d) of § 15.111 list the options available to the appellate official with regard to the appeal of denial of records,

appeal of fee determinations, and appeal of denial of expedited processing, respectively. The options listed are those currently codified in § 15.112(b), but redrafted for clarity.

#### **IV. Findings and Certifications**

##### Executive Order 12866 and Executive Order 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if the regulation is necessary, to select the regulatory approach that maximizes net benefits. Because this rule would incorporate changes enacted by the OPEN Government Act of 2007 and otherwise would update and streamline HUD's current FOIA regulation, this rule was determined to not be a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and therefore was not reviewed by OMB.

##### Environmental Impact

This rule is categorically excluded from environmental review under the National Environmental Policy Act (42 U.S.C. 4321). The revision of the FOIA-related provisions of 24 CFR part 15 falls within the exclusion provided by 24 CFR 50.19(c)(1), in that it does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy.

##### Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic

impact on a substantial number of small entities. This proposed rule would establish the process by which HUD would respond to requests for information under FOIA. Costs assessed by HUD for search, review, and duplication required to process the information requested by a requester are limited by FOIA to direct costs and are not economically significant. As a result, the proposed rule would not have a significant economic impact on a substantial number of small entities.

#### Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This proposed rule would not have federalism implications and would not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

#### Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This proposed rule would not impose any federal mandates on any state, local, or tribal governments, or on the private sector, within the meaning of the Unfunded Mandates Reform Act of 1995.

#### **List of Subjects in 24 CFR Part 15**

Classified information, Courts, Freedom of information, Government employees, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, HUD proposes to amend 24 CFR part 15 as follows:

**PART 15—PUBLIC ACCESS TO HUD RECORDS UNDER THE FREEDOM OF  
INFORMATION ACT AND TESTIMONY AND PRODUCTION OF INFORMATION  
BY HUD EMPLOYEES**

1. The authority citation for 24 CFR part 15 is revised to read as follows:

**Authority:** 42 U.S.C. 3535(d).

Subparts A and B also issued under 5 U.S.C. 552.

Section 15.107 also issued under E.O. 12958, 60 FR 19825, 3 CFR Comp., p333.

Subparts C and D also issued under 5 U.S.C. 301.

2. Revise subpart A to read as follows:

**Subpart A – General Provisions**

Sec.

15.1 General provisions.

15.2 Definitions.

**§ 15.1 General provisions.**

(a) Scope. Requests for material from HUD will be processed as set forth in this part. The Federal Housing Administration and the Government National Mortgage Association are components of HUD and are also covered by this part.

(b) Subpart B. Subpart B of this part contains the rules that HUD follows in processing requests for records under the Freedom of Information Act (FOIA) (5 U.S.C. 552). These rules should be read together with the FOIA, which provides additional information about access to records maintained by HUD. Information routinely provided to the public as part of a regular

Department activity may be provided to the public without following this subpart.

(c) Subpart C. Subpart C of this part describes the procedures to be followed and standards to be applied in processing demands for the production of material or provision of testimony in legal proceedings among private litigants.

(d) Subpart D. Subpart D of this part describes the procedures to be followed and standards to be applied in processing demands for the production of material or provision of testimony in legal proceedings in which the United States is a party.

(e) Inspector General. Subparts B and C of this part do not apply to the Office of the Inspector General. The procedures that apply to the Office of the Inspector General are described in parts 2002 and 2004 of this title.

## **§ 15.2 Definitions.**

(a) The following definitions apply to this part.

Agency records means any documentary material that is either created or obtained by an agency in the transaction of agency business and is under agency control. “Agency record” does not include records that are not already in existence and that would have to be created specifically to meet a request.

Business information means commercial or financial information provided to HUD by a submitter that arguably is protected from disclosure under Exemption 4 (42 U.S.C. 552(b)(4)) of FOIA.

FOIA means the Freedom of Information Act (5 U.S.C. 552).

HUD means the Department of Housing and Urban Development.

Review means the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. Review time includes processing

any record for disclosure (for example, doing all that is necessary to redact it and prepare it for disclosure). Review costs are recoverable even if a record ultimately is not disclosed. Review time includes time spent considering any formal objection to disclosure, made by a business submitter under § 15.108, but does not include time spent resolving general legal or policy issues regarding the application of exemptions.

Search means the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format.

Secretary means the Secretary of Housing and Urban Development.

Submitter means any person or entity that provides business information, directly or indirectly, to HUD. The term includes, but is not limited to, corporations, State governments, and foreign governments.

(b) The following definitions apply to subparts C and D of this part.

Appropriate Associate General Counsel means the Associate General Counsel for Litigation or the Associate General Counsel for HUD Headquarters employees in those programs for which the Associate provides legal advice.

Appropriate Regional Counsel means the Regional Counsel for the Regional Office having delegated authority over the project or activity with respect to which the information is sought. For assistance in identifying the Appropriate Regional Counsel, see appendix A to this part.

Authorized Approving Official means the Secretary, General Counsel, Appropriate Associate General Counsel, or Appropriate Regional Counsel.



Demand means a subpoena, order, or other demand of a court or other authority that is issued in a legal proceeding and any accompanying submissions.

Employee of the Department means a current or former officer or employee of the United States appointed by or subject to the supervision of the Secretary, but does not include an officer or employee covered by part 2004 of this title.

Good cause means necessary to prevent a miscarriage of justice or to promote a significant interest of the Department.

Legal proceeding includes any proceeding before a court of law or other authority; i.e., an administrative board or commission, a hearing officer, an arbitrator or other body conducting a quasi-judicial or legislative proceeding.

Legal proceeding among private litigants means any legal proceeding in which the United States is not a party.

Legal proceeding in which the United States is a party means any legal proceeding including as a named party the United States, the Department of Housing and Urban Development, any other federal executive or administrative agency or department, or any official thereof in his official capacity.

Material means either documents or information contained in, or relating to contents of, the files of the Department or documents or information acquired by any person while such person was an employee of the Department as a part of the performance of his or her official duties or because of his or her official status.

Production means to produce material by any means other than through the provision of oral testimony.

Testimony means any oral or written statements made in litigation under oath or penalty

of perjury.

United States means the Federal Government of the United States (including the Department), the Secretary, and any employees of the Department in their official capacities.

3. Revise subpart B to read as follows:

**Subpart B – Procedures for Disclosure of Records Under the FOIA**

Sec.

15.101 Proactive disclosures of department records.

15.102 Requirements for making requests for records.

15.103 Timing of responses to requests.

15.104 Procedures for processing FOIA requests.

15.105 Responses to requests.

15.106 Fees.

15.107 Documents generally protected from disclosure.

15.108 Business information.

15.109 Mortgage sales.

15.110 Appeals.

15.111 HUD response to appeals.

**§ 15.101 Proactive disclosures of department records.**

(a) In General. Records that are required to be made available for public inspection and copying are accessible on the Department's website at <http://www.hud.gov>. Published agency records, whether or not they are available for purchase, are made available for examination.

Each HUD office (Headquarters and field) has a FOIA Public Liaison that can assist individuals

in locating records. A list of the Department's FOIA Public Liaisons is available at <http://www.hud.gov>.

(b) Electronic FOIA reading room. As required by 5 U.S.C. 552(a)(2), HUD makes available records created on or after November 1, 1996, through its electronic FOIA Reading Room, located on HUD's FOIA website at <http://www.hud.gov>. These records include:

- (1) Final opinions and orders.
- (2) Public access to high value, machine readable datasets via Data.gov.
- (3) Statements of policy and interpretation, including:
  - (i) HUD's Client and Information Policy System (HUDCLIPS);
  - (ii) Housing policy;
  - (iii) Public and Indian Housing policy and regulations;
  - (iv) Public and Indian Housing policy and guidance (PHA Plans); and
  - (v) Community Planning and Development policy and guidance.
- (4) Administrative staff manuals.
- (5) HUD's online library.
- (6) Fair housing information.

(c) Frequently requested materials. HUD also makes available frequently requested materials on its FOIA website at <http://www.hud.gov>. These frequently requested materials include information related to:

- (1) Highest-scoring funding grant applications.
- (2) Purchase charge cardholders.
- (3) FHA refunds.
- (4) FHA-approved lenders.

- (5) Homes for sale.
- (6) How to buy a HUD home.
- (7) How to apply for public housing and Section 8 housing.
- (8) Housing for the elderly.
- (9) Housing for individuals with disabilities.
- (10) HUD contracting home page.
- (11) FHA mortgage insurance programs.
- (12) HUD handbooks.
- (13) HUD programs.
- (14) HUD telephone directory.
- (15) HUD homes listings.
- (16) HUD's organization.
- (17) Multifamily housing data.
- (18) Public housing authority contact information.
- (19) Weekly listing of multifamily properties for sale.
- (20) Catalog of Federal Domestic Assistance (CFDA) materials.
- (21) Grants.
- (22) FOIA request logs.

**§ 15.102 Requirements for making requests for records.**

(a) In general. Any request for HUD records must be in writing and submitted to the FOIA Public Liaison in the HUD field office where the records are located or to the Office of the Executive Secretariat in HUD Headquarters if the request is for records located in HUD Headquarters.

(b) HUD field office records. Requests for records located in a HUD field office may be submitted to the public liaison at the field office by mail (including courier or delivery service), email, or facsimile.

(c) HUD headquarters records. Requests for records located in HUD Headquarters may be submitted via an electronic request form on HUD's FOIA website at <http://www.hud.gov>. Requests can also be submitted to the Office of the Executive Secretariat in HUD headquarters in person or by mail (including courier or delivery service), email, or facsimile.

(d) Form of requests. FOIA requests should:

(1) Be in writing and clearly identifiable as a FOIA request. To facilitate identification, the requester should place the phrase "FOIA Request" on the front of the envelope or on the cover sheet or other transmittal document used when submitting the request in person or by mail, email, facsimile, or electronic request form;

(2) Include, whenever possible, detailed and specific information about each record sought, such as the date, title or name, author, recipient, and subject matter of the record. The more specific the FOIA request for records, the more likely HUD officials will be able to locate the records requested. Requests for categories of information should be for specific and well-defined categories. Insufficient descriptions may lead HUD officials to contact the requester to seek additional information for their record search;

(3) Indicate the form or format in which the requester would like the record made available, if the requester has a preference;

(4) Specify the fee amount the requester is willing to pay. In general, HUD provides records at no cost up to \$25. Requesters are required to agree to pay for any costs that exceed \$25. Requesters may also request a dollar amount above which HUD should consult with them

before they agree to pay the fee. If a requester seeks a fee waiver or reduction, the requester should include this request with the FOIA disclosure request, and should describe, consistent with § 15.106(k), how the disclosure of the requested information is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester;

(5) Indicate the fee category that the requester believes applies to each of his or her requests. Fee categories are defined in § 15.2 and § 15.106(b);

(6) Include verifying information of the requester's identity, if the requester requests agency records pertaining to the requester, a minor, or an individual who is legally incompetent, pursuant to the Privacy Act of 1974, as amended, 5 U.S.C. 552a. Information about what constitutes acceptable verifying information can be found in HUD's Privacy Act regulations in 24 CFR part 16;

(7) Contain signed authorization from the other person, if the requester makes a request on another person's behalf for information about that person. If necessary, HUD will inform the requester of the authorization needed from the other person and give the requester an opportunity to provide authorization. Requests for information about another person should be accompanied by either written, notarized authorization or proof that the individual is deceased (for example, a copy of a death certificate or obituary), or that request will be deemed insufficient; and

(8) Contain a detailed explanation of the basis for the request, if the requester makes a request for expedited processing as provided by § 15.104(d). The requester should also include a statement certifying the truth of the circumstances alleged or other evidence, acceptable to HUD, of the requester's compelling need.

**§ 15.103 Timing of responses to requests.**

(a) In general. HUD will generally respond to a FOIA request within 20 working days, depending on the size of the request. The 20-day period will begin on the day the request is first received by the appropriate component of HUD, but in any event not later than 10 working days after the request is first received by any component of HUD designated to receive FOIA requests.

(b) Tolling the 20-day time period. Under the OPEN Government Act of 2007, HUD may toll the 20-day period:

(1) One time to make one reasonable request for additional information from the requester; or

(2) As many times as necessary to clarify fee assessment issues with the requester. The agency's receipt of the requester's response to the agency's request for information or resolution of all fee assessment issues ends the tolling period.

(c) Extension of time periods for processing a request. In unusual circumstances, as defined in this paragraph, HUD may extend the time period for processing a FOIA request. If processing a request would require more than 10 working days beyond the general time limit established in paragraph (a) of this section, HUD will offer the requester an opportunity to limit the scope of the request so that HUD may process it within the extra 10-day working period or arrange an alternative time period within which the FOIA request will be processed. For purposes of this section, unusual circumstances include:

(1) The need to search for and collect records not located in the office processing the request;

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records; or

(3) The need to consult with another government agency or two or more HUD components having a substantial interest in the determination of the FOIA request.

(d) Aggregating multiple requests. HUD may aggregate multiple requests in cases where unusual circumstances exist and HUD determines that:

(1) Certain requests from the same requester or from a group of requesters acting in concert actually constitute a single request; and

(2) The requests involve clearly related matters.

Aggregation of requests for this purpose will be conducted independent of aggregation of requests for fee purposes under § 15.106(h).

**§ 15.104 Procedures for processing FOIA requests.**

(a) In general. HUD will ordinarily respond to FOIA requests according to their order of receipt.

(b) Tracking number. FOIA requests will be logged in as received and assigned a tracking number. A requester should use the tracking number to identify his or her request when contacting the FOIA Office for any reason.

(c) Expedited processing. (1) Requests and appeals will be taken out of order and given expedited treatment whenever it is determined that they involve:

(i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(ii) An urgency to inform the public about an actual or alleged Federal Government activity, if made by a person primarily engaged in disseminating information; or

(iii) The loss of substantial due process rights.



(2) A request for expedited processing may be made at the time of the initial request for records or at any later time. For a prompt determination, a request for expedited processing should be received by the proper office designated to receive FOIA requests as provided in § 15.102.

(3) A requester that seeks expedited processing should submit a statement, certified to be true and correct to the best of that person's knowledge and belief, explaining in detail the basis for requesting expedited processing. For example, a requester who makes a request under paragraph (c)(1)(ii) of this section, if not a full-time member of the news media, should establish that he or she is a person whose main professional activity or occupation is information dissemination, though it need not be his or her sole occupation. A requester making a request under paragraph (c)(1)(ii) of this section also should establish a particular urgency to inform the public about the government activity involved in the request, beyond the public's right to know about government activity generally. The formality of certification may be waived as a matter of administrative discretion.

(4) HUD will make a determination whether to grant or deny a request for expedited processing within 10 calendar days of receipt by the appropriate component of HUD as provided in § 15.102 and notify the requester of HUD's determination. FOIA requests accepted for expedited processing will be processed as soon as practicable and on a priority basis.

(d) Multitrack processing. (1) For requests that do not qualify for expedited processing, HUD may use two or more processing tracks by distinguishing between simple and more complex FOIA requests based on one or more of the following: the time and work necessary to process the FOIA request, the volume of agency records responsive to the FOIA request, and

whether the FOIA request qualifies for expedited processing as described in paragraph (c)(2) of this section.

(2) When HUD uses multitrack processing, it may provide requesters in its slower track(s) an opportunity to limit the scope of their requests in order to qualify for faster processing within the specified limits of HUD's faster track(s). When HUD chooses to provide this option, HUD will contact the requester either by telephone, letter, or email, whichever is more efficient in each case.

**§ 15.105 Responses to requests.**

(a) Acknowledgements of requests. The FOIA Office of the Office of the Executive Secretariat in HUD Headquarters and the FOIA Public Liaison in each HUD field office will ordinarily send an acknowledgement letter to the requester that will confirm receipt of the request by the appropriate HUD office and provide an assigned tracking number as provided by § 15.104(b) for further reference.

(b) Consultations, coordination, and referrals. When HUD receives a request for a record in its possession, it shall determine whether another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under the FOIA or whether it should be disclosed as a matter of administrative discretion. If HUD determines that it is best able to determine whether the record is exempt from disclosure, then it shall do so. If HUD determines that it is not best able to make that determination, then it shall either:

(1) Respond to the request regarding that record, after consulting with the agency best able to determine whether to disclose it and with any other agency that has a substantial interest in it; or

(2) Refer the responsibility for responding to the request regarding that record to the agency that originated the record, but only if that agency is subject to the FOIA. Ordinarily, the agency with which the record originated will be presumed to be best able to determine whether to disclose it.

(c) Fee estimates. HUD will notify the requester if HUD's estimate of the fee is more than the requester has agreed to pay. Consistent with § 15.106(e), the requester shall have 15 working days to either agree to pay the higher fee or to reformulate the request so that it can be processed at an amount that is agreeable to the requester.

(d) Forms of response. (1) Granting requests in whole or in part. Once HUD makes a determination to grant a request in whole or in part, it will notify the requester in writing. HUD will make a record available in the form or format requested, if the record is readily reproducible in that format. HUD will inform the requester in the notice of any fee charged under § 15.106 and disclose records to the requester promptly upon payment of any applicable fee. Records disclosed in part will be marked or annotated to show the amount of information deleted and the exemption(s) under which each deletion is made, unless doing so would harm an interest protected by an applicable FOIA exemption. The location of the information deleted and the exemption(s) under which the deletion is made will be indicated directly on the record itself, if technically feasible.

(2) Adverse determination of requests. If a determination is made to deny a request in any respect, HUD shall notify the requester of that determination in writing. Adverse determinations, or denials of requests, include: a determination to withhold any requested record, in whole or in part; a determination that a requested record does not exist, cannot be located, or has not been retained; a determination that a record is not readily reproducible in the form or

format sought by the requester; a determination that what has been requested is not a record subject to the FOIA; a determination on any disputed fee matter, including a denial of a request for a fee waiver or reduction; and a denial of a request for expedited treatment. The denial letter shall be signed by the Executive Secretariat or a designee of the Executive Secretariat in HUD Headquarters or the FOIA Public Liaison for the HUD field office where the adverse determination was made, and shall include:

- (i) The name and title or position of the person responsible for the denial;
- (ii) A brief statement of the reason(s) for the denial, including any FOIA exemption applied by HUD in denying the request;
- (iii) An estimate of the volume of records or information withheld, when appropriate, in number of pages or in some other reasonable form of estimation. This estimate does not need to be provided if the volume is otherwise indicated through deletions on records disclosed in part, or if providing an estimate would harm an interest protected by an applicable exemption; and
- (iv) A statement that the denial may be appealed as provided by § 15.110 and a description of the requirements for appeal.

#### **§ 15.106 Fees.**

(a) In general. HUD will charge for processing requests under the FOIA in accordance with paragraph (c) of this section, except where fees are limited under paragraph (d) of this section or where a waiver or reduction of fees is granted under paragraph (k) of this section. HUD shall collect all applicable fees before sending copies of requested records to a requester. In order to resolve any fee issues that arise under this section, HUD may contact a requester for additional information. Requesters shall pay fees by check or money order made payable to the United States Treasury.

(b) Definitions. For purposes of this section:

Commercial use means a request from or on behalf of a person who seeks information for a use or purpose that furthers his or her commercial, trade, or profit interests, which can include furthering those interests through litigation. HUD shall determine, whenever reasonably possible, the use to which a requester will put the requested records. When it appears that the requester will put the records to a commercial use, either because of the nature of the request itself or because HUD has reasonable cause to doubt a requester's stated use, HUD shall provide the requester a reasonable opportunity to submit further clarification.

Direct costs means those expenses that HUD actually incurs in searching for and duplicating and, in the case of commercial use requests, reviewing records to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing the work and the cost of operating computers and other electronic equipment, such as for mainframe computer run time. Not included in direct costs are overhead expenses such as the costs of space and heating or lighting a facility.

Duplication means the process of making a copy of a document necessary to respond to a FOIA request. Such copies can take the form of paper copy, audio visual materials, or machine readable documentation (*e.g.*, diskette), among others. HUD shall honor a requester's specified preference of form or format of disclosure if the record is readily reproducible with reasonable efforts in the requested form or format by the office responding to the request.

Educational institution. (1) Educational institution means:

- (i) A preschool;
- (ii) A public or private elementary or secondary school;
- (iii) An institution of graduate higher education;

- (iv) An institution of undergraduate higher education;
- (v) An institution of professional education; or
- (vi) An institution of vocational education, that primarily (or solely) operates a program or programs of scholarly research.

(2) To be in this category, a requester should show that the request is authorized by, and is made under the auspices of, a qualifying institution and that the records are not sought for a commercial use but are sought to further scholarly research. Records requested for the intention of fulfilling credit requirements are not considered to be sought for a scholarly purpose.

Noncommercial scientific institution means an institution that is not operated on a “commercial” basis, as defined in this section, and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. To be in this category, a requester should show that the request is authorized by, and is made under the auspices of, a qualifying institution and that the records are not sought for a commercial use but are sought to further scientific research.

Other requester means any requester that does not fall within the categories of requesters described in this section.

Representative of the news media, or news media requester, means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term news means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals that disseminate news and make their products available to the general public through a variety of means. For

freelance journalists to be regarded as working for a news media entity, they should demonstrate a solid basis for expecting publication through a news media entity. A publication contract would be the clearest proof, but HUD will also look to the past publication record of a requester in making this determination. To be in this category a requester should not be seeking the requested records for a commercial use. However, a request for records supporting the news dissemination function of the requester shall not be considered to be for a commercial use.

(c) Fees. In responding to FOIA requests, HUD will use the Fee Schedule set out in the following table, unless a waiver or reduction of fees has been granted under paragraph (k) of this section.

#### **FOIA FEE SCHEDULE**

<b>Activity</b>	<b>Rate</b>	<b>Commercial use requester</b>	<b>News media, educational institution, or noncommercial scientific institution requester</b>	<b>Other requester</b>
(1) Professional search	\$13 per quarter hour	Applies	Does not apply	Applies. No charge for first 2 hours of cumulative search time
(2) Professional review	\$13 per quarter hour	Applies	Does not apply	Does not apply
(3) Clerical search	\$6 per quarter hour	Applies	Does not apply	Applies. No charge for first 2 hours of cumulative search time.
(4) Clerical review	\$6 per quarter hour	Applies	Does not apply	Does not apply
(5) Programming services required	Direct costs associated with search	Applies	Does not apply	Applies
(6) Duplication costs	\$0.18 per page	Applies	Applies. No charge for first 100 pages	Applies. No charge for first 100 pages
(7) Duplication	Actual cost	Applies	Applies	Applies

costs—tape, CD  
ROM or diskette

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(1) Search. (i) Search fees will be charged for all requests other than requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media, subject to the limitations of paragraph (d) of this section. HUD may charge for time spent searching even if HUD does not locate any responsive record or if HUD withholds the record(s) located as entirely exempt from disclosure.

(ii) For each hour spent by personnel searching for requested records, including electronic searches that do not require new programming, the fees will be \$13 per quarter hour for professional personnel and \$6 per quarter hour for clerical personnel.

(iii) Requesters will be charged the direct costs associated with conducting any search that requires the creation of a new program to locate the requested records.

(iv) For requests requiring the retrieval of records from any Federal Records Center, certain additional costs may be incurred in accordance with the Transactional Billing Rate schedule established by the National Archives and Records Administration.

(2) Duplication. Duplication fees will be charged to all requesters, subject to the limitations of paragraph (d) of this section. For a paper photocopy of a record (no more than one copy of which need be supplied), the fee will be \$0.18 per page. For copies in digital format, HUD will charge the direct costs, including operator time, of producing the copy. Where paper documents should be scanned in order to comply with a requester's preference to receive the records in an electronic format, the requester shall pay the direct costs associated with scanning those materials. For other forms of duplication, HUD will charge the direct costs.



(3) Review. Review fees will be charged to requesters who make a commercial use request. Review fees will be charged only for the initial record review (the review done where HUD determines whether an exemption applies to a particular record or record portion, at the initial request level). No charge will be made for review at the administrative appeal level for an exemption already applied. However, records or portions of records withheld under an exemption that is subsequently determined not to apply may be reviewed again to determine whether any other exemption not previously considered applies. The cost of that review is chargeable where it is made necessary by such a change of circumstances. Fees for the review time will be \$13 per quarter hour for professional personnel and \$6 per quarter hour for clerical personnel.

(d) Restrictions on charging fees. (1) No search fee will be charged for requests by educational institutions, noncommercial scientific institutions, or representatives of the news media. In addition, when HUD fails to comply with the applicable time limits in which to respond to a request and no unusual or exceptional circumstance, as those terms are defined by the FOIA, apply to the processing of the request, HUD will not charge search fees, or in the instances of requests from educational institutions, noncommercial scientific institutions, or representatives of the news media, as defined by paragraph (b) of this section, HUD will not charge duplication fees.

(2) Search and review fees will be charged in quarter-hour increments. HUD will round up a quarter hour when professional and clerical search and review time exceeds a quarter-hour increment.

(3) Except for requesters seeking records for a commercial use, HUD will provide without charge:

(i) The first 100 pages of duplication (or the cost equivalent); and

(ii) The first 2 hours of search (or the cost equivalent).

(4) No fee will be charged whenever a total fee calculated under paragraph (c) of this section is less than HUD's cost to process the payment. Currently, whenever a total fee calculated is \$25 or less, no fee will be charged.

(e) Notice of anticipated fees in excess of \$25. When HUD determines or estimates that the fees to be charged under this section will amount to more than \$25, HUD shall notify the requester of the actual or estimated amount of the fees, unless the requester has indicated a willingness to pay fees as high as the amount anticipated. If only a portion of the fee can be readily estimated HUD shall advise the requester that the estimated fee may be only a portion of the total fee. In cases in which a requester has been notified that actual or estimated fees amount to more than \$25, the request will be held in abeyance for 15 working days. Further work shall not be done on that request until the requester has either made a firm commitment to pay the anticipated total fee or has made payment in advance if the total fee exceeds \$250. Any such agreement should be memorialized by the requester in writing, should indicate a given dollar amount, and should be received by HUD within the time period specified by HUD in its notice to the requester. If the requester does not provide a firm commitment to pay the anticipated fee within the time period specified by HUD, the request will be closed. A notice under this paragraph will offer the requester an opportunity to discuss the matter of fees with HUD personnel in order to reformulate the request to meet the requester's needs at a lower cost. HUD is not required to accept payments in installments.

(f) Charges for other services. Although not required to provide special services, if HUD chooses to do so as a matter of administrative discretion, HUD will charge the direct costs of

providing these services. Examples of such services include certifying that records are true copies, providing multiple copies of the same document, or sending documents by means other than ordinary mail.

(g) Charging interest. HUD may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges will be assessed at the rate provided in 31 U.S.C. 3717 and will accrue from the date of the billing until payment is received by HUD. HUD will follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97–365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(h) Aggregating requests. If HUD reasonably believes that a requester or a group of requesters acting together is attempting to divide a request into a series of requests for the purpose of avoiding fees, HUD may aggregate those requests and charge accordingly. HUD may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. Where requests are separated by a longer period, HUD will aggregate them only where there is a reasonable basis for determining that aggregation is warranted under all the circumstances involved. Multiple requests involving unrelated matters will not be aggregated. Aggregation of requests for fee purposes under this paragraph will be conducted independent of aggregation of requests under §15.103(d).

(i) Advance payments. (1) For requests other than those described in paragraphs (i)(2) and (3) of this section, HUD will not require the requester to make an advance payment before work is begun or continued on a request. Payment owed for work already completed, such as prepayment before copies are sent to a requester, is not an advance payment.

(2) If HUD determines or estimates that a total fee to be charged under this section will be more than \$250, it may require the requester to make an advance payment of an amount up to the amount of the entire anticipated fee before beginning to process the request, except where it receives a satisfactory assurance of full payment from a requester who has a history of prompt payment.

(3) If a requester has previously failed to pay a properly charged FOIA fee to HUD within 30 days of the date of billing, before HUD begins to process a new request or continues to process a pending request from that requester, HUD will require the requester to pay the full amount due, plus any applicable interest, and to make an advance payment of the full amount of any anticipated fee. If HUD has a reasonable basis to believe that a requester has misrepresented his or her identity in order to avoid paying outstanding fees, it may require that the requester provide proof of identity.

(4) When HUD requires advance payment, the request will be held in abeyance for 15 working days to allow the requester an opportunity to make payment in advance and/or modify the scope of the request. If the requester does not pay the advance payment or modify the scope of the request within the allotted time frame, the request will be closed.

(j) Other statutes specifically providing for fees. The fee schedule in this section does not apply to fees charged under any statute that specifically requires an agency to set and collect fees for particular types of records. Where records responsive to requests are maintained for distribution by agencies operating such statutorily based fee schedule programs, HUD will inform requesters of the contact information for that source.

(k) Requirements for waiver or reduction of fees. (1) Records responsive to a request will be furnished without charge or at a charge reduced below that established under paragraph (c) of

this section if HUD determines, based on all available information, that the requester has demonstrated the following:

(i) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and

(ii) Disclosure of the information is not primarily in the commercial interest of the requester.

(2) To determine whether the first fee waiver requirement is met, HUD will consider the following factors:

(i) The subject of the requested records should concern identifiable operations or activities of the Federal Government, with a connection that is direct and clear, not remote or attenuated.

(ii) The disclosable portions of the requested records should be meaningfully informative about government operations or activities in order to “likely to contribute” to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such increased understanding, where nothing new would be added to the public’s understanding.

(iii) The disclosure should contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester’s expertise in the subject area and ability and intention to effectively convey information to the public shall be considered. It shall be presumed that a representative of the news media will satisfy this consideration.

(iv) The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, should be enhanced by the disclosure to a significant extent. However, HUD will not make value judgments about whether information at issue is "important" enough to be made public.

(3) To determine whether the second fee waiver requirement is met, HUD will consider the following factors:

(i) HUD shall identify any commercial interest of the requester as defined in paragraph (b)(1) of this section, or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure. Requesters shall be given an opportunity in the administrative process to provide explanatory information regarding this consideration.

(ii) A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater than that of any identified commercial interest in disclosure. HUD ordinarily will presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return shall not be presumed to primarily serve the public interest.

(4) Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver will be granted for those records.

(5) Requests for the waiver or reduction of fees should address the factors listed in paragraphs (k)(2) and (k)(3) of this section, insofar as they apply to each request. In deciding to grant waivers or reductions of fees, HUD will exercise its discretion to consider the cost effectiveness of its investment of administrative resources.

**§ 15.107 Documents generally protected from disclosure.**

FOIA contains nine exemptions (5 U.S.C. 552(b)) that protect various records from disclosure. With regard to certain types of records, HUD generally applies the exemptions as follows:

(a) Classified documents. Exemption 1 (5 U.S.C. 552(b)(1)) protects classified national defense and foreign relations information. HUD seldom relies on this exception to withhold documents. However, where applicable, HUD will refer a request for records classified under Executive Order 12958 and the pertinent records to the originating agency for processing. HUD may refuse to confirm or deny the existence of the requested information if the originating agency determines that the fact of the existence of the information itself is classified.

(b) Internal agency rules and practices. Exemption 2 (5 U.S.C. 552(b)(2)) protects records relating to internal personnel rules and practices.

(c) Information prohibited from disclosure by another statute. Exemption 3 (5 U.S.C. 552(b)(3)) protects information that is prohibited from disclosure by another federal law. HUD generally, will not disclose competitive proposals submitted prior to contract award that are not incorporated into the contract, unsuccessful contract proposals (see 41 U.S.C. 253(b)), or advance information on grant funding decisions, including information that would give a grant applicant an unfair competitive advantage (see 42 U.S.C. 3537a).

(d) Commercial or financial information. Exemption 4 (5 U.S.C. 552(b)(4)) protects trade secrets and commercial or financial information obtained from a person that is privileged and confidential. HUD will handle this type of information as provided by § 15.108.

(e) Certain interagency or intra-agency communications. Exemption 5 (5 U.S.C. 552(b)(5)) protects interagency or intra-agency communications that are protected by legal

privileges, such as the attorney-client privilege, attorney work-product privilege, or communications reflecting the agency's deliberative process.

(f) Personal privacy. Exemption 6 (5 U.S.C. 552(b)(6)) protects information involving matters of personal privacy. This information may include personnel, medical, and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Names, addresses, telephone numbers, and email addresses of persons residing in public or assisted housing or of borrowers in FHA-insured single family mortgage transactions generally will not be disclosed.

(g) Law enforcement records. Exemption 7 (5 U.S.C. 552(b)(7)) protects certain records or information compiled for law enforcement purposes. This exemption protects records where the production could reasonably be expected to interfere with enforcement proceedings; for example, the names of individuals who have filed fair housing complaints. The protection of this exemption also encompasses, but is not limited to, information in law enforcement files that could reasonably be expected to constitute an unwarranted invasion of personal privacy; the names of confidential informants; and techniques and procedures for law enforcement investigations, or guidelines for law enforcement investigations if such disclosure could reasonably be expected to risk circumvention of the law.

(h) Supervision of financial institutions. Exemption 8 (5 U.S.C. 552(b)(8)) protects information relating to the supervision of financial institutions. For purposes of Exemption 8, HUD is considered an "agency responsible for the regulation and supervision of financial institutions" for purposes of monitoring fair housing compliance.

(i) Wells. Exemption 9 (5 U.S.C. 552(b)(9)) protects geological information on wells.

#### **§ 15.108 Business information.**



(a) In general. Business information obtained by HUD from a submitter will be disclosed under the FOIA only under this section. In making final confidentiality determinations under this section, HUD relies to a large extent upon the information furnished by the affected business to substantiate its claim of confidentiality. HUD may be unable to verify the accuracy of much of the information submitted by the affected business. HUD will comply with Executive Order 12600 and follow the procedure in this section by giving notice to the affected business and an opportunity for the business to present evidence of its confidentiality claim. If HUD is sued by a requester under the FOIA for nondisclosure of confidential business information, HUD expects the affected business to cooperate to the fullest extent possible in defending such decision.

(b) Designation of business information. A submitter of business information will use good faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of its submission that it considers to be protected from disclosure under Exemption 4. These designations will expire 10 years after the date of the submission unless the submitter requests, and provides justification for, a longer designation period.

(c) Notice to submitters. HUD will provide a submitter with prompt written notice of a FOIA request or administrative appeal that seeks business information, wherever required under paragraph (d) of this section, in order to give the submitter an opportunity to object to disclosure of any specified portion of that information under paragraph (e) of this section. The notice will either describe the business information requested or include copies of the requested records or portions of records containing the information. When notification of a voluminous number of submitters is required, notification may be made by posting or publishing the notice in a place reasonably likely to accomplish notification.

(d) Where notice is required. Notice will be given to a submitter wherever:

(1) The information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or

(2) HUD has reason to believe that the information may be protected from disclosure under Exemption 4.

(e) Opportunity to object to disclosure. HUD will allow a submitter a reasonable time to respond to the notice described in paragraph (c) of this section and will specify that time period within the notice. If a submitter has any objection to disclosure, the submitter should submit a detailed written statement specifying the grounds for withholding any portion of the information under any exemption of FOIA and, in the case of Exemption 4, the submitter should show why the information is a trade secret or commercial or financial information that is privileged or confidential. HUD generally will not consider conclusory statements that particular information would be useful to competitors or would impair sales, or other similar statements, sufficient to justify confidential treatment. In the event that a submitter fails to respond to the notice within the time specified, the submitter will be considered to have no objection to the disclosure of the information. Information provided by the submitter that is not received until after the disclosure decision has been made will not be considered by HUD. Information provided by a submitter under this paragraph may itself be subject to disclosure under the FOIA.

(f) Notice of intent to disclose. HUD will consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose business information. Whenever HUD decides to disclose business information over the objection of a submitter, HUD will give the submitter written notice, which will include:

(1) A statement of the reason(s) why each of the submitter's disclosure objections was not sustained;

(2) A description of the business information to be disclosed; and

(3) A specified disclosure date, which shall be a reasonable time subsequent to the notice.

(g) Exceptions to notice requirements. The notice requirements of paragraphs (c) and (f) of this section will not apply if:

(1) HUD determines that the information should not be disclosed;

(2) The information lawfully has been published or has been officially made available to the public; or

(3) Disclosure of the information is required by statute (other than the FOIA) or by a regulation issued in accordance with the requirements of Executive Order 12600.

(h) Notice of FOIA lawsuit. Whenever a requester files a lawsuit seeking to compel the disclosure of business information, HUD will promptly notify the submitter.

(i) Corresponding notice to requesters. Whenever HUD provides a submitter with notice and an opportunity to object to disclosure under paragraph (f) of this section, HUD will also notify the requester(s). Whenever a submitter files a lawsuit seeking to prevent the disclosure of business information, HUD shall notify the requester(s).

#### **§ 15.109 Mortgage sales.**

(a) Disclosure of certain information in connection with mortgage sales. HUD will release information regarding a Mortgagor's statement of profit and loss only to eligible potential mortgage purchasers and only during the period specified by HUD for a mortgage sale.

(b) Conditions for releasing information. HUD will release information regarding a Mortgagor's statement of profit and loss only if all of the following three conditions are met:

(1) The information concerns a project that is subject to a HUD-held mortgage that HUD is selling under the authority of Sections 207(k) and (l) of the National Housing Act (12 U.S.C. 1713(k) and (l)) or Section 7(i)(3) of the Department of Housing and Urban Development Act (42 U.S.C. 3535(i)(3)).

(2) The eligible potential purchasers have agreed to:

(i) Keep the information confidential;

(ii) Disclose the information only to potential investors in the mortgage and only for the period specified by HUD for the mortgage sale and to notify those potential purchasers of their obligations under this section;

(iii) Use the information only to evaluate the mortgage in connection with the mortgage sale; and

(iv) Follow disclosure procedures for that sale that have been established by the Secretary of HUD.

(3) The potential investors in the mortgage have agreed to keep the information confidential and to use the information only to evaluate the mortgage in connection with their investment decision.

(c) Investor use of disclosed information. Potential investors in the mortgage shall not disclose the information to other entities unless the disclosure is:

(1) Necessary for the investor's evaluation of the mortgage;

(2) Made in accordance with disclosure procedures for the specific sale that have been established by HUD; and

(3) Limited to the period specified by HUD for the mortgage sale.

(d) Improper use of disclosed information. An eligible potential purchaser or a potential investor (who has received the information from a potential purchaser and has been notified by that entity of its obligations under paragraph (b) of this section) who discloses information in violation of this section may be subject to sanctions under 2 CFR part 2424.

### **§ 15.110 Appeals.**

(a) In general. A requester may appeal an adverse determination denying a request, in any respect, in writing to the address specified in HUD's notice responding to the FOIA request (see § 15.105). The letter of appeal should clearly identify the determination that is being appealed and the assigned tracking number. The appeal letter and envelope should be marked "Freedom of Information Act Appeal" for the quickest possible handling. If mailed, the requester's letter of appeal must be postmarked within 30 calendar days of the date of HUD's letter of determination. If the letter of appeal is transmitted by means other than the United States Postal Service, it must be received in the appropriate office by the close of business on the 30<sup>th</sup> calendar day after the date of HUD's letter of determination.

(b) Time frames. (1) Expedited processing. HUD will decide an appeal of a denial of a request to expedite processing of a FOIA request within 10 working days of receipt of the appeal.

(2) All other appeals. HUD will make a determination on appeals within 20 working days of receipt unless unusual circumstances require HUD to extend the time for an additional 10 working days.

(3) Exceptions. An appeal ordinarily will not be acted upon if the subject of the appeal is simultaneously being litigated in an applicable federal court.

(c) Content of appeals. An appeal letter should include the following:

- (1) A copy of the original request;
- (2) A copy of the adverse determination;
- (3) A statement of facts and legal arguments supporting the appeal; and
- (4) Any additional information the appellant wishes to include.

(d) When appeal is required. Before seeking a court review of HUD's adverse determination, a requester generally should have exhausted their administrative remedies.

**§ 15.111 HUD response to appeals.**

(a) In general. (1) The appellate official will conduct a de novo review of the entire record and applicable law when making a decision.

(2) The decision on the appeal will be made in writing and will be considered the final action of HUD.

(i) A decision affirming an adverse determination, in whole or in part, will contain a statement of the reason(s) for the affirmation, including any FOIA exemption(s) applied, and will inform the appellant of the FOIA provisions for potential court review of the decision.

(ii) If the adverse determination is modified on appeal, in whole or in part, a written decision will be sent to the appellant and the FOIA request will be reprocessed in accordance with the appeal decision.

(b) Appeal of a denial of record request. Upon appeal of a denial of a record request, the appellate official will issue a decision that either:

(1) Overturns the adverse determination, in whole or in part, and remands the request to the appropriate office. The requester will be notified of the rationale for the determination in writing. The original office will then reprocess the request in accordance with the appeal determination and respond directly to the requester; or

(2) Affirms the adverse determination and declines to provide the requested records to the appellant.

(c) Appeal of a fee determination. Upon appeal of a fee determination, the appellate official will issue a decision that either:

- (1) Waives the fee or charges the fee that the appellant requested;
- (2) Modifies the original fee charged and explains why the modified fee is appropriate; or
- (3) Advises the appellant that the original fee charged was appropriate and gives the reasons behind this determination.

(d) Appeal of a denial of expedited processing. Upon appeal of a denial of an expedited processing request, the appellate official will issue a decision that either:

- (1) Overturns the adverse determination and grants the expedited processing request; or
- (2) Affirms the decision to deny expedited processing.

Date: May 1, 2013

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Shaun Donovan  
Secretary

**[FR-5624-P-01]**

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